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EX PARTE

Filed electronically via ECFS

May 18, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW, Room TW-B204
Washington, DC 20554

RE: *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68

In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133

Dear Ms. Dortch:

On May 9, 2006, and May 16, 2006, in a series of multiple meetings, Melissa Newman, Lynn Starr and Robert McKenna of Qwest met with (or participated via telephone) Michelle Carey, Ian Dillner, Dana Shaffer, Sam Feder, Joel Kaufman, Matthew Berry, Diane Griffin, Scott Bergmann and Scott Deutchman, to discuss prepaid calling cards.

The attached *ex parte* presentation was prepared by Robert McKenna as a follow-up to the meetings. Please contact the undersigned or Robert McKenna with any question as to the presentation.

This *ex parte* and attached presentation are being filed with the Commission via ECFS pursuant to Rules 1.49(f) and 1.1206(b), 47 C.F.R. §§ 1.49(f), 1.1206(b). Qwest requests that it be made part of the record of the above-referenced two proceedings.

Sincerely,

/s/ Melissa E. Newman

Attachment

Copy via email to:

S. Bergmann
M. Berry
M. Carey
S. Deutchman
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Robert B. McKenna
Associate General Counsel

DATE: May 18, 2006

RE: *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68

In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Card Services, WC Docket No. 03-133

EX PARTE PRESENTATION

On April 26 and 27, 2006, Verizon and AT&T submitted ex parte presentations in the above-captioned dockets.[1] These presentations take the position that it would be "patently unfair" (AT&T) for the Commission to issue a decision in the prepaid calling card docket that had retrospective impact. Instead these parties seem to be requesting that the Commission take action in this docket in a manner that insulates them from liability for payment for interstate access services which they received from local exchange carriers prior to issuance of the anticipated order in this docket. They basically assert that the Commission has the equitable authority to forgive certain purchasers of interstate access who had avoided paying the lawful tariffed rate from making such payments at this time. This equitable authority should be exercised, so goes the claim, because AT&T, Verizon and others were confused as to whether the services that they utilized to originate and terminate interstate traffic should have been purchased from ILEC access tariffs. It is in this mode that AT&T and Verizon seek to have the Commission rule that whatever rules are adopted in this proceeding be specified as being "prospective only."

Qwest submits that this approach completely misses a key point. Whether the Commission chooses to adopt rules that are prospective or not, a private action for recovery of tariffed charges for services rendered in the past is based on the law as it actually existed when the services were offered. If this law is confusing, then it is up to a proper adjudicator or regulator to state what the law was. Merely stating that whatever rules are adopted in the current docket are to be prospective does not dispose of the critical question -- what was the law at the time the services were rendered? The Commission can make this decision itself or it can leave the matter to courts if lawsuits are filed to collect this claimed compensation. The Commission cannot, however, cut off private rights of action for past services simply by decreeing that a new rule is itself to be applied prospectively.

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[1] Letter from Kathleen Grillo, Verizon to Marlene H. Dortch, FCC, WC Docket No. 05-68 (Apr. 26, 2006); Letter from Jack Zinman, AT&T Services, Inc. to Marlene H. Dortch, FCC, WC Docket No. 05-68 (Apr. 27, 2006).

I. Background and Introduction.

Qwest has pending lawsuits against both Verizon and AT&T that involve various aspects of information services and access charges.[2] One claim is that Verizon and AT&T improperly classified long distance traffic as local traffic, often by claiming that it was really information service traffic. In none of these cases has either AT&T or Verizon sought a primary jurisdiction referral to this Commission to obtain a determination from this Agency as to what the relevant law was when Verizon and AT&T utilized Qwest's local exchange switching facilities to originate and terminate interstate common carrier traffic in a manner that avoided Qwest's tariffed access charges.[3] Qwest believes that the law is and has been clear and that such traffic must be originated or terminated on local exchange switching facilities via tariffed interstate access services.[4] It appears that Verizon and AT&T seek to have this Commission somehow intercept the courts hearing these cases by an FCC ruling that it would be "inequitable" for Qwest to collect its tariffed rates for services actually rendered in the past, and that the FCC's interpretation of its rules in this docket be adopted as "prospective only."

Verizon's and AT&T's position is legally wrong. The FCC's authority to adopt a rule that is prospective only is limited to situations where a new rule is actually adopted. It does not apply to interpretations of pre-existing law, whether that pre-existing law was unclear or not. Nor does it empower the Commission to forgive private debts based on equitable considerations. The Commission cannot deprive a complaining party of its right to collect its tariffed rates or to damages for failure to comply with lawful tariffs by proclaiming that, while the law entitled the party to the requested payments or damages, the law was confusing and it would be inequitable to allow a party damaged by breach of that law to recover its damages. Qwest is entitled to payment based on what the law was. If the law was confusing, then it is up to an adjudicator or regulator to state what the law was.

Qwest also disagrees with the "equitable" argument that Verizon and AT&T present. Although their ostensible confusion is questionable at best,[5] such confusion would be irrelevant even if

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[2] *Qwest Corporation v. AT&T Corp., et al.*, Civil Case No. 05-CV-00375-REB-PAC (U.S. Dist. Ct.-Colo., Complaint filed Feb. 28, 2005); *Qwest Corporation v. MCI, Inc., et al.*, Civil Case No. 06-CV-00033-REB-MJW (U.S. Dist. Ct.-Colo., Complaint filed Jan. 1, 2006).

[3] Qwest's position is and always has been simple. An ISP/ESP POP is to be treated as an end user for access charge purposes. If a carrier carries information services, whether its own or those of another, the nature of the carriage (and the nature of the payment due to originating and/or terminating LECs) is determined by the locations of the ISP/ESP POP and the other party to the call. There is no magical transformation of a carrier's carrier service into something else simply by the addition of the information service of the carrier.

[4] This conclusion is equally true for so-called "menu-driven" calling card services, in which a calling card customer is given the option to make a long distance call to an information service provider's computer. A long distance telephone call to a computer has never been deemed to exempt the carrier that carries the call from the payment of access charges, whether the computer was owned by the long distance carrier or by someone else.

[5] *See*, for example, Letter from James C. Smith, (formerly SBC) to Chairman Michael Powell, Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC

proven. AT&T and Verizon are seeking to apply a legal analysis to this situation that is totally inapplicable. When a customer uses a tariffed interstate service, it has an obligation to pay the tariffed rate whether the customer was legitimately confused about the rate or not.[6] If AT&T or Verizon used an ILEC's facilities in a manner that required payment under that carrier's filed interstate access tariffs, the question is not what AT&T or Verizon thought the tariff meant or required, but what the tariff actually did require. The question is a simple matter of a duly incurred and lawfully owing debt. There is simply no basis upon which the Commission could act to erase such a debt if it was premised on a lawful tariff (or contract or other legal basis for a demand for lawful payment).[7]

The argument that the Commission can erase a lawful debt based on a filed tariff if the FCC's own policies were confusing or embryonic is based on the assumption that a customer's legal obligation to pay a filed tariff rate is somehow equivalent to a prospective FCC rule, which is normally applied retroactively only in limited circumstances.[8] But these situations have nothing to do with the obligation of a customer to pay the lawful rate in a filed tariff. That is a legal obligation that the Commission cannot modify under the guise of a legal construct that applies to rulemakings. Whatever the law was when the tariffed charge was incurred, that is the law that must govern the payment obligation of the customer. If the law was confusing, then the Commission has an opportunity to resolve this confusion, but it cannot eliminate or invalidate a lawful debt owed by a customer to a carrier on the basis that the debtor was confused as to the meaning of the Commission's rules.[9]

Qwest submits that the law is (and has been) clear that carriers that carry information services on their own facilities are not thereby excused from the normal rules governing purchase of services from LECs' access tariffs. But even if the law had not been clear, if the Commission makes a determination clarifying this point it cannot be applied only prospectively in a manner that cuts off the private rights of other carriers. The filed tariff doctrine is not a matter of equity or fairness. It is a matter of law. If AT&T and Verizon used ILEC local exchange switching facilities to originate or terminate interstate traffic in a manner that called for the payment of access charges, the Commission cannot excuse them from making such payments without

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Docket No. 02-361, January 14, 2004; Letter from Kathleen Grillo, Verizon to Marlene H. Dortch, Re: WC Docket No. 02-361, January 22, 2004.

[6] *American Telephone and Telegraph Company v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998).

[7] *See AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied, MCI v. AT&T*, 509 U.S. 913 (1993); *MCI Telecommunications Corporation v. FCC*, 10 F.3d 842 (D.C. Cir. 1993). These cases are discussed in detail below.

[8] *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, concurring); *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988); *In the Matter of 1993 Annual Access Tariff Filings*, Order Terminating Investigation, 20 FCC Rcd 7672, 7692-93 ¶ 49 (2005); *In the Matter of Amendment of Part 1 of the Commission's Rules*, Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order, 18 FCC Rcd 10180, 10211 ¶ 46 (2003).

[9] AT&T and Verizon were well aware that ILECs interpreted their tariffs in a manner that required carriers to purchase access services when they originated or terminated interexchange traffic, even if the carrier was carrying an information service. Indeed, AT&T (in its prior life as SBC) and Verizon have been among the most articulate exponents of this interpretation of their own tariffs.

making a decision on what the law actually was when the service was provided. The legal precedents on retroactivity deal with retroactive application of new FCC rules and declarations of new policy. On the other hand, in the context of Qwest's right to collect its tariffed charges, Qwest's tariffs either applied to the services in question or they did not. There is nothing "prospective" about any FCC decision on the issue of Qwest's right to collect for services provided in the past.[10]

II. Relevant Judicial Decisions Demonstrate that the Commission cannot Lawfully Comply with AT&T's and Verizon's Request for a "Prospective-only" Ruling if such a Ruling would Adversely Affect the Private Rights of Qwest and other Carriers to Collect their Lawful Access Charges.

This basic principle is well illustrated in several cases in which AT&T and Verizon were the principle litigants (at the time of the actions, MCI Telecommunications was not yet part of Verizon). We discuss these cases at some length.

A. American Telephone and Telegraph Company v. FCC.[11]

AT&T had brought a complaint against MCI at the Commission pursuant to Sections 206-208 of the Communications Act. AT&T claimed that MCI had been offering interstate common carrier services on a contractual, rather than a tariffed basis, in violation of the Communications Act.[12] AT&T requested issuance of a cease and desist order and damages. The Commission dismissed the complaint on the basis, in part, that it was issuing a notice of proposed rulemaking in which it would examine whether an earlier Commission policy permitting such detariffed operations had been overruled by a subsequent appellate court decision. AT&T appealed, claiming that it had an absolute right for a determination of the lawfulness of MCI's past conduct and for assessment of damages if they could be proven.

The Court vacated the earlier Commission *Order* on which the Commission had relied in dismissing AT&T's complaint, reversed the dismissal itself, and remanded the case to the Commission for further assessment of AT&T's requests for relief. The Court emphasized several important principles in so doing.

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[10] This is especially true because any evasion of the payment of access charges to LECs by AT&T or Verizon could give them a discriminatory advantage over their competitors, the very type of discrimination that the filed tariff doctrine was meant to avoid. *See, e.g., Marcus v. AT&T Corp.*, 138 F.3d 46, 60-61 (2d Cir. 1998).

[11] *AT&T v. FCC*, 978 F.2d 727.

[12] Section 203(c) of the Act provides:

> No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder.

The Supreme Court ultimately held that this language precluded the FCC from detariffing interstate common carrier services subject to its jurisdiction. *See* 47 U.S.C. § 160 (1996). The 1996 amendments to the Act granted the Commission permission to forbear from requiring tariffs.

- When the Commission acts as an adjudicator of private rights, a complainant has a statutory right to a finding of whether a defendant's past actions violated the law as it existed at the time relevant to the complaint. The Court stated:

> Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking. But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 US 204, 208 (1988). The choice an agency has between different methods of 'making law' is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in *Meredith*, the Commission "confuses its quasi-judicial role with its quasi-legislative one." *Meredith* [*Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987), *cert denied*, 493 U.S. 1019 (1990)].[13]

- In analyzing a damages claim, the Commission has the authority to apply the standard retroactivity analysis (that is, retroactivity is permissible only in certain cases and can be defeated by equitable considerations) only in those cases where there has been a *bona fide* change in the law, and even here a damages claim would lie based on what the law was before it was changed. While the Court ultimately did not decide the damages issue (leaving that for further analysis by the Commission), that was so because the Commission had not sufficiently explained what it had been doing or attempting to do to permit legal analysis. The Court observed as follows:

> We do not think it appropriate to resolve this dispute and apply the five factor test [for retroactivity] at this stage because we do not fully understand what the Commission sees as "the law" to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our *MCI* interpretation, it would have to explain why that is a change in the law.
>
> The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.[14]

In the absence of an actual change in the law, there would be no lawful basis on which the Commission could avoid its statutory obligation to award damages to an injured party.

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[13] *AT&T v. FCC*, 978 F.2d at 732.

[14] *Id.* at 737.

- In cases of adjudication of private rights, the fact that a defendant had proceeded in good faith is irrelevant to the award of damages to the party injured by the defendant's conduct.[15]

B. MCI Telecommunications Corporation v. FCC.[16]

MCI had complained to the Commission under Section 206 that AT&T had unlawfully bundled inbound and outbound 800 services in violation of the Communications Act, thereby damaging MCI. In the same year the Commission initiated a rulemaking proceeding to determine whether this precise practice should be prohibited prospectively. Ultimately the Commission found that the practice was indeed anti-competitive and outlawed it for future AT&T customers, but grandfathered AT&T's existing customers. The Commission dismissed MCI's damages complaint on the basis that the rulemaking order was prospective only.

The Commission had held:

> The effect of our finding in the *IXC Orders* regarding the unlawfulness of bundling 800 or inbound services using old 800 numbers is prospective and prior customers are grandfathered. Consistent with the *IXC Orders*, we conclude that no liability for damages attaches to AT&T for conduct occurring prior to the release date of the *IXC Recon Order*.[17]

The appellate Court criticized the Commission shirking its statutory duty to adjudicate complaints and award damages to a party who had proven a past violation of the Communications Act:

> The Commission's reliance on the *IXC Orders* to dispose of MCI's complaint is a *non sequitur*. Nothing in the *Orders* in any way purports to determine the legality of conduct occurring before their effective date.[18]

The Court and MCI agreed that the Commission's *IXC Orders* shielded AT&T from liability for damages for grandfathered customers beginning on the date of the *Orders*, but the Court held that "it [was] an error of logic to claim, as the Commission did, that the ruling controls the question of AT&T's liability for provision of services before the effective date of the [*IXC Orders*]."[19] The Court finally cited *AT&T* (*supra*) and reminded the Commission that it could not avoid its

[15] *See id.* at 734-5, 736.

[16] *MCI v. FCC*, 10 F.3d 842.

[17] *MCI Telecommunications Corp. v. American Tel. and Tel. Co.*, Memorandum Opinion and Order, 7 FCC Rcd 3047, 3050-51 ¶ 22 (1992), quoted by the Court in *MCI v. FCC*, 10 F.3d at 845.

[18] *MCI v. FCC*, 10 F.3d at 846.

[19] *Id.*

responsibilities in an adjudication by referring to the generally prospective nature of a rulemaking proceeding. The Court ultimately held that "the Commission acted arbitrarily and capriciously in dispensing with MCI's complaint for damages on the basis of the *IXC Orders*."[20]

C. *Overearnings Cases.*[21]

AT&T and various other IXCs brought complaints against a number of ILECs for damages under Sections 206-208 of the Act on the basis that the ILECs' earned rates-of-return for the two-year rate-of-return monitoring periods upon which earned rates-of-return were reviewed and measured exceeded the prescribed rate-of-return.[22]

The ILEC earned rate-of-return was reported in three separate categories, and the Commission's initial rules had required that "overearning" in any category would result in an automatic refund to the ILEC's customers (almost entirely IXCs). The Court of Appeals vacated the refund rules on the basis that they were inconsistent with the theory of rate-of-return earnings which required refunds based on overearnings to consider the total earnings of all reported categories -- thus requiring that "overearning" and "underearning" categories be analyzed and allowed to offset each other.[23] Thereafter AT&T and the other IXCs initiated complaint proceedings, claiming that they had been damaged by the earnings of ILECs in any category in which the ILEC had "overearned," essentially requesting by way of damages the precise relief that the Court had held could not be awarded by way of refunds.

In response, the Commission granted the complaints, holding that damages for past violations of the Act were governed by entirely different standards than applied to the refund rules that the Court had vacated. Thus, the Commission awarded AT&T and the other complainants damages caused by ILECs' overearning. However, the Commission did not grant the complainants full relief, but instead tailored the damages remedy to the "total overearnings" model that the Court had mandated for overearning refunds -- allowing an ILEC to set off "underearnings" in one rate-of-return reporting category against damages liability caused by "overearnings" in another category. All parties appealed, and the Court affirmed the Commission with regard to its findings that the ILECs owed damages to the IXCs, but reversed the Commission's decision to allow limited offsets from these damages for category "underearnings."[24]

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[20] *Id.* at 847.

[21] *MCI Telecommunications Corp., et al. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995), *cert. dismissed, BellSouth Telecomms. v. FCC*, 517 U.S. 1129 (1996), *cert. denied, BellSouth Telecomms. v. FCC*, 517 U.S. 1219 (1996).

[22] The lexicon of overearnings cases is vast. The law and facts, except as otherwise cited here, are summarized in the Court's decision.

[23] *American Tel. and Tel. Co. v. FCC*, 836 F.2d 1386-92 (D.C. Cir. 1988).

[24] *MCI v. FCC*, 59 F.3d at 1416, 1420.

Several important principles which govern AT&T's and Verizon's liability to ILECs for their tariffed access services are stated in the Court's overearnings decision and the Commission proceedings which led up to that decision.

- The ILECs had claimed that they had acted in complete good faith in filing tariffs that were accurately targeted to earn the appropriate return, and that it was inequitable for the FCC to award damages based on the innocent conduct of the ILECs. This and other equitable claims advanced by the ILECs were summarily rejected by the Commission on the basis that they were outside the scope of a damages inquiry occasioned by a violation of the Communications Act.

> The defendants' arguments are devoted primarily to attempting to persuade the Commission that MCI's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to defendants, militate against any award of damages to MCI based on excessive earnings. The defendants argue, in effect, that the damages MCI seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in AT&T v. FCC. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act, this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.[25]

The Commission similarly rejected the ILECs' contention that damages should not be awarded because it would result in a "windfall" to the IXCs:

> The consideration of whether such an award would result in a windfall to MCI has no place in the context of a Section 208 proceeding that, contrary to defendants' repeated assertions, <u>is not governed by equitable principles</u>. MCI has been damaged by defendants' excessive earnings and, under <u>legal principles</u>, is entitled to an award of damages.[26]

- However, the Commission did not grant the IXCs the full measure of damages they had requested, allowing ILECs to offset "overearnings" in one category by the amount of "underearnings" in another rate reporting category. In response, the Court found that the

[25] *MCI Telecommunications Corporation v. Pacific Bell Telephone Company*, 8 FCC Rcd 1517, 1525-26 ¶ 30 (1993) (footnote omitted).

[26] *Id.* at 1526 ¶ 33 (emphasis supplied).

FCC had misapprehended the statutory mandate that governs individual adjudications of liability and damages when a carrier is demonstrated to have violated the Act. Finding that the Commission did not have jurisdiction to direct a customer of an ILEC to pay for services,[27] the Court reviewed the entirety of the FCC's decision to permit these limited offsets. Even though the offsets themselves comported strictly with the earlier Court decision on refunds, the Court found that those same offsets were arbitrary and capricious in the context of "adjudicating an individual damage complaint. . . ."[28]

These principles apply with full force to the instant analysis.

The basic retroactivity issue here is very simple. If AT&T and Verizon used an ILEC's local switching facilities to originate or terminate interstate common carrier traffic (including common carrier traffic that was carrying an information service), the ILECs are entitled to payment for services provided. Any equitable defenses that AT&T or Verizon feel that they are entitled to can be raised in court although confusion as to what rate to pay is not a defense that is sufficient to overcome a claim under the filed tariff doctrine. The Commission could decree that it was establishing a prospective rule concerning some information services, but this would not dispose of the independent question of what the law was at the time that AT&T and Verizon made use of Qwest's local exchange facilities. Someone will ultimately need to decide this question -- either the Commission or a court. What would not be appropriate is for the Commission to attempt to absolve AT&T or Verizon for the amounts due and owing to Qwest for services provided in the past under the legal structure that governed all parties' actions. Whether or not AT&T and Verizon were confused by this legal structure is irrelevant. Whether they have equitable defenses to the payments demanded by Qwest is a matter for the appropriate court to decide.

The Commission should simply make the proper determination of the law and leave AT&T and Verizon to defend themselves in court.[29] If an issue comes up that requires the Commission's expertise, an appropriate primary jurisdiction argument can be filed with the court.

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[27] *MCI v. FCC*, 59 F.3d at 1418-19.

[28] *Id.* at 1419.

[29] In point of fact, that is precisely what the Commission did in deciding the original AT&T prepaid calling card case. *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, 4835 ¶ 28 (2005).